

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ROBERT D. HARRELL, SR.

Claimant

V.

MID-AMERICA EXTERIORS, INC.

Respondent

and

KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND

Insurance Carrier

Docket No. 1,073,322

ORDER

Respondent and insurance carrier (respondent) requests review of the June 11, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali Marchant. Claimant appears by counsel, Randy S. Stalcup. Respondent appears by counsel, Roy T. Artman.

ISSUES

The ALJ found claimant was an employee of respondent on the day he was injured and entitled to workers compensation benefits. The ALJ ordered respondent to provide claimant with the names of two qualified physicians from which claimant may designate an authorized treating physician. The ALJ also found medical expenses incurred to date are authorized medical expenses and ordered respondent to pay the medical expenses and temporary total disability benefits from February 26, 2015, to March 26, 2015.

Respondent's application for review lists a single issue: whether claimant's February 26, 2015, accidental injury, arose out of and in the course of his employment. Respondent argues claimant was an independent contractor, not an employee. Respondent asserts claimant entered into an independent subcontractor agreement requiring him to purchase liability insurance and provide his own workers compensation insurance. Respondent contends claimant voluntarily undertook the work project offered by respondent when he could have declined because he was an independent contractor. Respondent requests the Board vacate the ALJ's decision.

Claimant requests the Board affirm the ALJ's decision.

The sole issue is: at the time of claimant's February 26, 2015, work accident, was he an employee of respondent?

FINDINGS OF FACT

Claimant's testimony

Claimant owned, RDH Enterprises (RDH), a sole proprietorship, and worked for respondent four to five years as a subcontractor installing siding. On June 15, 2012, respondent had claimant complete a subcontract agreement. According to claimant, as part of that agreement, he annually obtained liability insurance and executed affidavits of exempt status under the Workers Compensation Act. He installed siding for respondent on residences throughout Wichita and small surrounding communities. While working for respondent, claimant provided his own tools. Other subcontractors assisted claimant, but were paid by respondent. Respondent paid claimant from \$39,000 to \$52,000 a year and provided him a 1099 tax form each year.

After finishing a job in February 2015, claimant had no more work. Claimant approached respondent's installation manager Troy Parks, about getting work because he was "flat broke." Mr. Parks told claimant that Dave Becker, one of respondent's owners, needed someone to work in the warehouse moving windows and doors and making room for new orders. Claimant and Mr. Becker met and agreed claimant would straighten up the warehouse, get rid of trash and build stalls for new windows. Respondent would pay claimant \$100 per day for five days.

Claimant started working in the warehouse on Saturday, February 21, 2015. Mr. Parks told claimant what to do and showed him how to do the job. Claimant worked eight hours on Saturday and Monday, but only worked four hours on Tuesday. Claimant worked again on Wednesday performing the same tasks as the other days.

On Wednesday, February 25, Mr. Parks told claimant he needed someone to travel to Edgerton the next day to help install some windows. Claimant told Mr. Parks he had never installed windows and would rather not go to Edgerton. Mr. Parks said respondent had no one else available and claimant agreed to go. Claimant indicated he felt obligated to go, because he was working in the warehouse. Claimant testified he was not told how he would be paid for the Edgerton job, but assumed it would be the same \$100 for eight hours he was paid for the warehouse job.

According to claimant, Mr. Becker talked to him about using a company vehicle and he was given \$200 to cover the fuel and expenses for the trip to Edgerton. Claimant's wages were not to come out of the \$200. After claimant drove the company vehicle home after work on Wednesday, he called Mr. Becker to tell him the vehicle was not road-worthy. The vehicle leaked oil, burned oil, and the windshield was cracked. Claimant did not want

to chance getting pulled over and receiving a ticket for a broken windshield. Claimant suggested driving his own vehicle and Mr. Becker agreed.

Claimant testified he was told by Mr. Parks to take two ladders and ladder planks with him to Edgerton. Claimant took his own ladders and planks to the job and drove his own vehicle. Claimant drove to the work site in Edgerton, which was a residence, and arrived at 8:00 a.m. Claimant was to meet a subcontractor named Russell¹ at the job site, who had experience installing windows.

Claimant testified that when Russell arrived, he instructed the ladders be set up from the vehicle, next to the windows, so they could cut out the windows. They needed to get up high because the windows were on the second story above the garage. Claimant and Russell set up the ladders and planks. The planks, made out of aluminum, are used to form a platform between the ladders.

Under the direction of Russell, claimant partially cut out the window they were to replace. Claimant testified he climbed the ladder and while transferring to the plank, lost his balance, fell ten to twelve feet onto concrete, landing on his left elbow and left side. Claimant had immediate pain in his left elbow and later in his left knee. No one witnessed claimant fall, but Russell, inside the house, heard the ladders falling and came outside as claimant was getting up. Claimant told Russell he fell and thought he fractured his arm.

Claimant left Edgerton and returned to Wichita for medical treatment. He called Mr. Becker and asked what to do and to which hospital he should go. Claimant informed Mr. Becker he did not have health insurance to cover his injuries and was uncertain what to do. Mr. Becker suggested claimant go to St. Francis Hospital in Wichita, because they had to accept him whether he had insurance or not. Claimant testified he and Mr. Becker did not discuss if this was a workers compensation injury or a personal injury.

Claimant was admitted to the hospital and Dr. Corrigan from Advanced Orthopedic Associates performed surgery on his left elbow. Claimant's rotator ball of his left elbow was shattered in the fall and Dr. Corrigan replaced it. Claimant had follow-up appointments with Dr. Corrigan and he referred claimant for physical therapy. Claimant had three visits at Advanced Physical Therapy. Claimant's last physical therapy visit was March 24 because his insurance would not cover the physical therapy and claimant could not afford to pay for the therapy.

Claimant did not work from February 26 to March 26, 2015. He was not given any restricted work slips by any doctors, but was told by Dr. Corrigan he could not lift more than five pounds with his left arm. Claimant told Mr. Becker and Mr. Parks and they understood the situation. Mr. Parks told claimant there was not much he could do with one arm, so he

¹ Claimant testified he did not know Russell's last name.

should get healed up and come back to work. Claimant is still under work restrictions, as far as he knows, and he has not seen a doctor since Dr. Corrigan.

At the end of March, claimant began driving for Uber. Claimant worked for two to three weeks until the Kansas Legislature made it impossible for Uber to operate in Kansas. Claimant next worked for Green Restoration and continues to work there as a foreman. Claimant supervises the crew doing siding installation, home interior remodel, bathroom remodel, laying floors, building decks, and general construction.

David L. Becker's testimony

Mr. Becker is a co-owner of respondent and performs operational duties. Mr. Becker is involved in production, running the business, and normal day-to-day operation activities. Respondent uses subcontractors in its business.

Mr. Becker is familiar with claimant and RDH. He testified respondent and claimant started their subcontractor arrangement in 2011, and executed a contract formalizing their arrangement in 2012. Respondent has their subcontractors fill out the contract to formalize their arrangements. Claimant agreed to provide proof of liability coverage and claimant executed an affidavit of exempt status for workers compensation coverage.

Mr. Becker testified claimant performed siding installation work for respondent on a regular basis, but not other types of installation work, such as installing doors or windows. On occasion any subcontractor may do other things like install a door or window or change some rotted plywood on a house.

Mr. Becker testified work slowed down a bit in January 2015 as it usually does that time of year. Respondent did not have anything claimant could do because of weather and the time of year. Mr. Becker was told by claimant he was destitute and could not pay his rent. Mr. Becker testified he tried to help claimant and give him something to keep busy so he could have a little income. According to Mr. Becker, he did not intend for their relationship to change. Mr. Becker testified respondent has a warehouse where products are stored. Mr. Becker told claimant he could clean the warehouse, organize a little, run errands and that sort of thing. They agreed to \$100 per day. Mr. Becker was finding things to keep claimant busy to subsidize him and did not intend to change the relationship between respondent and claimant.

According to Mr. Becker, Russell, a subcontractor, was working by himself on a project in Edgerton, Kansas. Russell was installing a large window in a house and needed help lifting it. Respondent asked claimant to help out on this one-time project lifting the window. Mr. Becker gave claimant \$200 to help him out, for gas or food. Mr. Becker indicated claimant was going to be paid by respondent, not by Russell.

Mr. Becker testified that after the accident, claimant was concerned his health insurance payment was not credited and he asked Mr. Becker if he could do anything. Mr. Becker took a collection at a Monday morning sales meeting and donated the money to claimant. A few days later, claimant said he needed help paying his rent and Mr. Becker gave him \$500 out of his pocket. Mr. Becker gave him cash on a couple of different occasions. When claimant returned from Edgerton, Mr. Becker told claimant he knew claimant was injured and would be off work for a while, so he wrote RDH a check for \$400 to \$600 for the work he performed in Edgerton. Mr. Becker also told claimant to keep the \$200 he gave claimant earlier for traveling to Edgerton. Mr. Becker did not know how many hours per day claimant worked; he paid claimant \$100 per day to help him out.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.² “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”³

The Kansas Supreme Court, in *McCubbin*,⁴ acknowledged there is no precise definition which can be applied in determining whether a person is an employee or an independent contractor. However, citing *Falls*,⁵ the Court in *McCubbin* stated: “An independent contractor is defined as one who, in exercising an independent employment, contracts to do certain work according to his own methods, without being subject to the control of his employer, except as to the results or product of his work.”⁶ The Court acknowledged that each case turns upon the facts particular to that case. However, the Court also stated the primary determination as to an employee relationship is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. The Court, again citing *Falls*, stated: “It is not the actual interference or exercise of the control by the employer, but the existence of the right or

² K.S.A. 2013 Supp. 44-501b(c).

³ K.S.A. 2013 Supp. 44-508(h).

⁴ *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

⁵ *Falls v. Scott*, 249 Kan. 54, 815 P2d 1104 (1991).

⁶ *McCubbin*, *supra*.

authority to interfere or control, which renders one a servant rather than an independent contractor.”⁷

Several other factors have been recognized as pertinent in determining whether a worker is an employee or an independent contractor. Those factors include:

- 1) The existence of a contract to perform a certain piece of work at a fixed price.
- 2) The independent nature of the worker's business or distinct calling.
- 3) The employment of assistants and the right to supervise their activities.
- 4) The worker's obligation to furnish tools, supplies, and materials.
- 5) The worker's right to control the progress of the work.
- 6) The length of time the worker is employed.
- 7) Whether the worker is paid by time or by the job.
- 8) Whether the work is part of the regular business of the employer.⁸

For the following reasons, this Board Member finds claimant was respondent's employee on February 26, 2015:

- Respondent provided control and supervision of claimant. Respondent directed claimant to go to Edgerton to assist a subcontractor install a window and told him to bring ladders and planks. Claimant was told when and where to report to work.
- Respondent was going to provide claimant a truck to transport himself and equipment to the Edgerton project, until claimant indicated respondent's truck was incapable of making the trip. Thus, claimant was not obligated to provide his own equipment, but chose to do so, because of the poor condition of respondent's truck.
- Respondent provided claimant expense money. A subcontractor pays his or her own expenses.
- Claimant was paid \$100 per day, not by the job.

⁷ *Id.*

⁸ *Musalek v. Nationwide Mobile Homes*, No. 247,878, 2000 WL 623092 (Kan. WCAB Apr. 25, 2000).

- Claimant and respondent did not enter into a written contract for the Edgerton project.
- Claimant was employed to assist installing a window, a job outside the scope of normal siding installation business activities.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, the undersigned Board Member affirms Administrative Law Judge Marchant's June 11, 2015, Order.

IT IS SO ORDERED.

Dated this ____ day of September, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Roy T. Artman, Attorney for Respondent and its Insurance Carrier
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Honorable Ali Marchant, Administrative Law Judge

⁹ K.S.A. 44-534a(a)(2).